A

## DATO' JOSEPH LAI KHEE SIN & ORS v. FONG WAI HENG

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL APPEAL NO: 11ANCVC-98-12-2014]
B 24 AUGUST 2015

***CIVIL PROCEDURE:*** *Summary judgment – Triable issues – Whether plaintiff established prima facie case against defendant – Whether defendant raised any bona fide issues to be tried – Whether plain and obvious case for granting summary*
C *judgment – Rules of Court 2012, O. 14*

***LABOUR LAW:*** *Provident fund – Liability to contribute – Employer paid employee's EPF contribution and not deducted from wages – Whether employee liable to pay employee's EPF contributions – Whether employer entitled to claim for refund from employee – Whether amounted to unjust enrichment to employee*
D

The plaintiffs were partners of the firm Allen & Gledhill ('the firm') which was dissolved in 2004. The plaintiffs alleged that from 1995 to 2004, the defendant was employed by the firm as a legal assistant and was paid a basic salary together with a monthly commission as determined by the plaintiffs
E on a monthly basis. The defendant, however, alleged that he was a partner of the firm. In 2005, as a result of the defendant's complaint, Kumpulan Wang Simpanan Pekerja ('KWSP') required the firm, as the employer of the defendant, to pay arrears of monthly contribution to KWSP on the amount of commissions paid to the defendant. It was not disputed that the plaintiffs
F paid the sum of RM115,876 to KWSP being the employee's and the employer's employee provident fund ('EPF') contributions in respect of the defendant's commission. Subsequently, the plaintiffs claimed from the defendant, a total sum of RM75,556 being the sum for the employee's EPF contribution and applied for summary judgment under O. 14 of the Rules of Court 2012. The plaintiffs' application was dismissed by the Magistrate and
G hence, this appeal.

**Held (allowing plaintiff's appeal):**

**(1)** Under the Employees Provident Fund Act 1991 ('EPF Act'), the firm is liable to pay only for the employer's EPF contributions whereas the
H employee is liable to pay for the employee's EPF contributions. In the present case, there was only evidence that the firm paid for both the employer's and the employee's EPF contributions in respect of the defendant's wages. There was no evidence that the defendant had paid the required EPF contribution. Thus, the sum paid by the firm for the
I employee's EPF contributions was a debt owed by the defendant to the plaintiffs as otherwise it would be unjust enrichment to the defendant. (paras 26 & 27)

**(2)** It was irrelevant whether the defendant was a legal assistant or a partner in the firm. What was material was whether the defendant's wages had been deducted by the firm for the employee's EPF contributions. If not, the defendant was liable to pay the plaintiffs for the employee's EPF contributions which the firm had paid earlier to KWSP on behalf of the defendant. (para 32)

**(3)** The plaintiff's claim was not barred by law, in particular, by s. 48 of the EPF Act as the plaintiffs' claim for the sum of RM75,556 was for unjust enrichment and not under s. 48 of the EPF Act. The plaintiffs had therefore established a *prima facie* case against the defendant whilst the defendant had failed to raise any *bona fide* issues to be tried. Hence, the case was a plain and obvious case for granting summary judgment against the defendant. (paras 33 & 34)

*[The plaintiff's appeal and consequently, application for summary judgment was allowed but for the reduced sum of RM53,668 based on the actual sum that had been proven to have been paid by the firm for the employee's EPF contributions].*

**Case(s) referred to:**
*Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC* ***(refd)***
*National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC* ***(refd)***

**Legislation referred to:**
Employees Provident Fund Act 1991, ss. 2, 43(1), 48(1), (2)
Employees Provident Fund (Amendment) Act 2000, s. 2
Rules of Court 2012, O. 14

*For the appellants/plaintiffs - Bahari Yeow Tien Hong (Tariq Azhar Maketab with him); M/s Lee Hishamuddin Allen & Gledhill*
*For the respondent/defendant - Yang Lee Yuen; M/s Kheng Hoe & Partners*

*Reported by S Barathi*

## JUDGMENT

**Yeoh Wee Siam J:**

**Appeal By Plaintiffs Against Magistrate's Decision**

**[1]** The matter before me is an appeal by the appellants/plaintiffs ("plaintiffs") against the decision of the learned Magistrate ("Magistrate") dated 17 November 2014 which dismissed the plaintiffs' application for summary judgment under O. 14 of the Rules of Court 2012 ("ROC") ("application") for the sum of RM75,556 and ordered costs of RM2,000.

**High Court's Decision**

**[2]** After considering the appeal of the plaintiffs on 9 April 2015, I reversed the decision of the Magistrate and allowed the plaintiffs' appeal. I ordered that summary judgment be given to the plaintiffs under O. 14 of

A the ROC against the respondent/defendant ("defendant") for the sum of RM53,663 together with interest at 5% per annum from the date of judgment on 9 April 2015 to the date of full realisation, and costs of RM5,000.

**Appeal By Defendant Against High Court's Decision**

B **[3]** On 18 August 2015 the defendant filed a notice of appeal against the decision of the High Court dated 9 April 2015.

**Background Facts**

**[4]** The plaintiffs were partners of the firm, Allen & Gledhill ("firm"), which was dissolved on 31 December 2004.

C

**[5]** The plaintiffs alleged that from 2 October 1995 to 30 September 2004, the defendant was employed by the firm as a legal assistant and was paid a basic salary of RM2,500 per month. The defendant was also paid a monthly commission of 7.5% of an amount which was determined by the plaintiffs on a monthly basis at their sole discretion which amount was a variable monthly amount depending on the income generated by the head office of the firm at Kuala Lumpur.

D

**[6]** However, the defendant alleged that he was a partner of the firm, as can be seen from the firm's letterhead. The first plaintiff had assured the defendant that a remuneration of RM10,000 would not be an issue. There was no discussion between the plaintiffs and the defendant regarding the payment of contributions to the Employees Provident Fund ("EPF"), or commission.

E

**[7]** In 2000, s. 2 of the Employees Provident Fund Act 1991 ("EPF Act") was amended pursuant to s. 2 of the Employees Provident Fund (Amendment) Act 2000, and the definition of wages was changed to include "commission". Consequently, EPF contributions became payable on "commission" earned by an employee.

F

**[8]** On 27 April 2005, after the defendant made complaints to the Kumpulan Wang Simpanan Pekerja ("KWSP"), Form E was issued by KWSP against the plaintiffs. KWSP also made demands on the plaintiffs to pay the EPF contributions of the defendant to KWSP.

G

**[9]** Notwithstanding the various appeals made by the plaintiffs to KWSP, KWSP required the firm, as the "employer" of the defendant, to pay arrears of monthly contributions to KWSP on the amount of commissions paid to the defendant.

H

**[10]** The plaintiffs paid RM115,876 to KWSP on 9 May 2008 being the employee's and employer's EPF contributions in respect of the defendant's commission, which KWSP recorded as received on 9 May 2008.

I

**[11]** It is not disputed that the defendant did not make any payment towards the EPF contributions on his commission to KWSP.

**[12]** On 28 February 2014, the plaintiffs, by a letter of demand, demanded the defendant to pay the total sum of RM75,556 being the sum for the employee's/defendant's EPF contributions (exh. P-3, pp. 81 and 82 of RR).

**[13]** The defendant failed to comply with the plaintiffs' letter of demand. The plaintiffs then filed the action in the Magistrate Court.

**The Law**

**[14]** In *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 the Federal Court held at p. 551 D-I and 552 A-C as follows:

> Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O. 14 application. With respect, that cannot be the correct proposition of law. In an application under O.14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r.2 of O.14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim. (See *Supreme Leasing Sdn Bhd v. Dior Enterprises & Ors* [1990] 2 MLJ 36). Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite. ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

(See also *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283).

**Grounds For High Court's Decision**

*Grounds For Magistrate's Decision*

**[15]** The Magistrate considered the following alleged issues to be tried raised by the defendant:

(a) What are the terms agreed between the first plaintiff and the defendant.

(b) Whether there is any agreement between the firm and the defendant regarding commission.

(c) If there is an agreement, how would the calculation of commission be made.

(d) Was the Form E submitted by the plaintiffs only for commission payment or for other payments.

(e) When would the obligation of the plaintiffs to pay according to Form E dated 27 April 2005 arise.

(f) Why the plaintiffs did not pay KWSP for the defendant's commission after the amendment to s. 2 of the EPF Act.

(g) How was the calculation for the amount of RM75,566.00 made.

**[16]** The Magistrate went on to state that for the plaintiffs' application, the plaintiffs only tendered three documents to support its claim against the defendant, namely:

(i) the EPF (Amendment) 2000 Act (exh. P-1);

(ii) Form E (exh. P-2); and

(iii) plaintiffs' letter of demand dated 28 February 2014 (exh. P-3).

**[17]** The Magistrate held that the above three documents were insufficient to grant the plaintiffs' application against the defendant.

**[18]** Further, the Magistrate held that the plaintiffs had failed to show the relationship between the plaintiffs and the defendant where the plaintiff had alleged that the defendant is a legal assistant whereas the defendant alleged that he was appointed as a partner. The defendant tendered the firm's letter where the defendant's name appeared in the letterhead as a partner of the firm (exh. FWH-2 of defendant's affidavit in reply).

**[19]** The Magistrate went on to state that the plaintiffs had failed to show proof that the money was paid to KWSP. The plaintiffs alleged that payment has been made based on Form E which was produced. The Magistrate stated that this is insufficient to prove that certainly the payment was made by the firm.

**[20]** The Magistrate concluded that this is not a straightforward case which is appropriate for summary judgment to be recorded against the defendant. The Magistrate then dismissed the plaintiffs' application with costs of RM2,000.

**The Defendant's Defence**

**[21]** The defendant's defence is as follows:

(i) the defendant's documents support the defendant's defence.

(ii) the EA Form exhibited by the defendant did not show any commission alleged by the plaintiffs (exh. FWH-3 at p. 118 of RR).

(iii) the salary slip exhibited by the defendant has also shown that the remuneration paid to the defendant was clearly identified as "basic pay" and a so called "allowance (not subj. to EPF)" (exh. FWH-4, pp. 121-125 of RR).

**Reasons For Reversal Of Magistrate's Decision**

**[22]** In this case, there is no dispute by the defendant that the plaintiffs had paid RM115,876 to KWSP on 9 May 2008 which KWSP had recorded as received on 9 May 2008. This sum paid by the plaintiffs is for:

(a) the employer's contributions; and

(b) the employee's contributions.

**[23]** Exhibits P-1, P-2 and P-3 are contemporaneous documents which show that the plaintiffs have paid both the employer's contributions and employee's contributions. In particular, Form E (exh. P-2, p. 71 of RR), together with the EPF inspection officer's signature, show the firm's name as employer and the defendant's name as employee, and the employer's contributions and employee's contributions totalling RM115,876 as asserted by the plaintiffs eg in Form E for 1995 (exh. P-2, p. 71 RR), RM720 was for the employer's EPF contribution and RM600 was for the employee's EPF contribution. It is observed that for every year from 1995 to 2004 (exh. P-2, pp. 71-79 RR), the firm did pay to KWSP the relevant sums for the respective contributions of the employer and employee. Furthermore, the plaintiffs' letter of demand to the defendant (exh. P-3, pp. 81-82 RR) stated the amount of RM75,556 being the employee's/defendant's EPF contributions.

**[24]** Section 43(1) of the EPF Act provides for the statutory obligation of an employer and an employee to pay monthly EPF contributions to the KWSP on the employee's wages as follows:

> 43. Rate of contributions.
>
> (1) Subject to the provisions of section 52, every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages at the rate respectively set out in the Third Schedule.

**[25]** The third schedule sets out the exact rate of contributions for the month to be paid (i) by the employer, and (ii) by the employee based on the "amount of wages for the month". For as long as an employee is paid wages, which includes commission, the employee has to pay monthly EPF contributions on the wages.

**[26]** Therefore, under the EPF Act, the firm is liable to pay only for the employer's contributions to KWSP. Under the EPF Act, the defendant, as an employee, is liable to pay for the employee's EPF contributions. In this case, there is only evidence that the firm paid for both the employer's and the employee's EPF contributions in respect of the defendant's wages. There is no dispute by the defendant on this. Neither is there evidence that the defendant has paid the required employee's EPF contributions. There was no deduction of the defendant's salary by the firm for the purpose of making the employee's EPF contributions to KWSP.

**[27]** Thus, whatever has been paid by the firm for the employee's EPF contributions is a debt or sum owed by the defendant to the plaintiffs. Otherwise, it would be unjust enrichment to the defendant for keeping what does not belong to him in the first place.

**[28]** The defendant contended that there was no discussion between the plaintiffs and the defendant regarding the payment of EPF contributions, or commission. The defendant asserted that he was a partner in the firm, and not a legal assistant or an employee of the firm. However, it is noted that despite these assertions, the defendant had lodged a complaint to KWSP regarding the arrears of the employee's EPF contributions which have not been paid by the firm as his employer. This shows clearly that the defendant knows and admits the fact that he was an employee of the firm, and not a partner in the firm of the plaintiffs.

**[29]** Therefore, the alleged issues to be tried raised by the defendant are not *bona fide* issues to be tried. In fact they are red herrings thrown in by the defendant to cloud the matter. It is irrelevant here whether the defendant was a legal assistant or a partner in the firm. What is material is whether the defendant's wages have been deducted by the firm for the employee's EPF contributions. If not, as in this case, then the defendant is liable to pay the plaintiffs for the employee's EPF contributions which the firm had paid earlier to KWSP on behalf of the defendant.

**Plaintiff's Claim Is Not Barred By Law**

**[30]** The defendant relied on s. 48 of the EPF Act which provides as follows:

> 48. Recovery by employer of employee's contribution.
>
> (1) Subject to the provisions of this section, the employer shall be entitled to recover from the employee, in accordance with this section, the amount of any contribution payable on behalf of the employee.
>
> (2) The amount of any contribution payable by the employer on behalf of the employee shall, notwithstanding the provisions of any written law or any contract to the contrary, be so recoverable by means of deductions from the wages of the employee due from the employer to the employee and not otherwise.
>
> (3) Any employer who deducts the employee's contributions from the wages of an employee and fails to pay such deducted sum or any part thereof to the Fund shall be guilty of an offence and shall on conviction, be liable to imprisonment for a term not exceeding six years or to a fine not exceeding twenty thousand ringgit or to both.
>
> (4) No deduction of any contribution shall be made as provided by subsection (2):

(a) except at the time wages are paid to the employee; and

(b) other than of the contribution in respect of the wages which are then being paid:

Provided that, subject to such conditions as may be prescribed by the Board, where an employer has, by error not occasioned by that employer's negligence, omitted to deduct any contribution or part of any contribution payable by him on behalf of the employee, then, such contribution or part thereof may be deducted from the wages payable by such employer to the employee not later than six months from the date of the payment of the wages in respect of which the contribution or part thereof was omitted to be deducted.

(5) Any employer who contravenes the provisions of subsection (4) shall be guilty of an offence.

(6) (Deleted).

**[31]** Learned counsel for the defendant submitted that:

(i) even if the plaintiffs are entitled to claim against the defendant (which is denied), pursuant to s. 48(2) of the EPF Act, the amount shall "be so recoverable by means of deductions from the wages of the employee …… and not otherwise"; and

(ii) section 48(4) of the EPF Act provides that no deduction of any contributions shall be made as provided not later than six months from the date of the payment of the wages in respect of which the contribution or part thereof was omitted to be deducted.

**[32]** With respect, I do not agree with learned counsel for the defendant in his submissions that the plaintiff's claim is time barred under s. 48 of the EPF Act since the firm did not make the requisite deductions from the defendant's wages within six months from the date of payment of the wages. In my opinion, s. 48(2) and (4) of the EPF Act would only apply here if the plaintiffs, as the employer, are making the claim under the same section. This can be seen clearly from the opening words of s. 48(1) which state, "**Subject to the provisions of this section**, the employer shall be entitled **to recover from the employee, in accordance with this section**, ..." (emphasis added).

**[33]** However, a perusal of para. 7 of the plaintiffs' amended statement of claim (pp. 10 - 14 of RR, at pp. 12 and 13) shows that the plaintiffs' claim for the sum of RM75,556 is for unjust enrichment, and not made under s. 48 of the EPF Act. That being the case, therefore, the plaintiffs' claim is not barred by law, in particular by s. 48 of the EPF Act.

**[34]** Going by the evidence adduced, and the governing legal provisions, I am satisfied that the Magistrate had erred in fact and in law in his decision. Clearly, the plaintiffs have established a *prima facie* case against the defendant

based on the contemporaneous documents produced in court. The defendant has failed to raise any *bona fide* issues to be tried here. This is a plain and obvious case for granting summary judgment against the defendant.

**[35]** I allowed the plaintiff's appeal, and consequently the plaintiffs' application for summary judgment, but for the reduced sum of RM53,668, and not RM75,556, based on the actual sum that has been proved to have been paid by the firm *via* Form E for the employee's EPF contributions for the years 1995 to 2004. The sums have been tabulated by learned counsel for the plaintiffs at p. 2 of the plaintiffs' outline submission in reply as follows:

Contributions to be paid to EPF as per the Borang E (pages 71-79, RA)

| Year | Employer's Share (RM) | Employee's Share (RM) |
|---|---|---|
| 1995 | 720 | 600 |
| 1996 | 10,452 | 9,581 |
| 1997 | 8,376 | 7,678 |
| 1998 | 2,340 | 2,145 |
| 2000 | 4,692 | 4,301 |
| 2001 | 9,000 | 7,020 |
| 2002 | 9,696 | 8,308 |
| 2003 | 9,552 | 8,020 |
| 2004 | 7,380 | 6,015 |
| Total | 62,208 | 53,668 |

| | | |
|---|---|---|
| Total contributions paid to KWSP | - | RM115,876 |
| Employee's share | - | RM 53,668 |
| Employer's share (1995 to 1998) | - | RM 21,888 |
| Total amount claimed | - | RM 75,556 |

(See also exh. P-3 ie plaintiffs' letter of demand, pp. 81 - 82 RR, for the sum of RM53,668 paid on the employee's part, and a further sum of RM21,888 paid on the employer's part).

**[36]** I did not allow summary judgment on the additional sum of RM21,888 which is the employer's contribution paid to KWSP for the defendant for 1995 to 1998 before the statutory amendment was made to the

definition of "wages" in s. 2 of the EPF Act on 1 July 2000 to include "commission". This, however, is not an issue here since there is no cross-appeal by the plaintiffs to the Court of Appeal on the sum of RM21,888.

**[37]** Based on the above considerations, I therefore ordered accordingly.